



Manufacturers and Traders Trust Company, One M&T Plaza, Buffalo, New York 14203 ^{PH}716 842-2366 ^{FX}716 842-5376
e-mail: mbriggs@mandtbank.com

Marissa K. Briggs
Vice President and Assistant Counsel

March 12, 2004

Ms. Jennifer J. Johnson
Secretary
Board of Governors
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

RE: Proposed Rule – Implementation of Check 21
Docket Number R-1176

Dear Ms. Johnson:

Thank you for the opportunity to comment on the amendments that the Federal Reserve Board (the “Board”) proposes to Regulation CC (the “Proposed Regulations”) to implement the Check Clearing for the 21st Century Act (the “Act”). Manufacturers and Traders Trust Company supports the concept of facilitating electronic check presentment and commends the efforts of the Board to simplify and clarify the Act through the Proposed Regulations. To this end we offer the following comments on the Proposed Regulations.

I. General Comments:

A. Expedited Recredit Procedure for Consumers (229.54):

1. Application of the expedited recredit provisions to a consumer who deposits a check, which is ultimately returned unpaid to the consumer’s account in the form of a substitute check.

We respectfully ask that the Board clarify whether the provisions regarding expedited recredit apply to a consumer who deposits a check which is ultimately returned unpaid to the consumer’s account in the form of a substitute check **or** whether the expedited recredit process is available only when a consumer writes a check and subsequently receives that check in the form of a substitute check. In the case of a deposit, the consumer’s account would be charged and it appears possible that the consumer could satisfy the conditions for making a claim, however, the rule seems to be designed primarily to protect a consumer who writes a check.

Several provisions of the Proposed Regulations appear to shed some light on this issue; however, they are inconsistent. The opening sentence of Model Notice C5-A states that some of the checks that a consumer receives “may look different than the check you wrote.” This suggests that the intended audience for the notice is only consumers who have written checks – **as** opposed to consumers who have deposited a check and had that item returned unpaid in the form of a substitute check. On the other hand, subsection 229.57(b)(2)(ii) provides that notice of

expedited recredit rights must be sent to a consumer who "receives a returned substitute check." In the Supplementary Information on page 26 the Board interprets this phrase as requiring that a notice be sent when "a check deposited by a consumer is returned unpaid to the consumer's account in the form of a substitute check."

If the expedited recredit procedures are available to a consumer who deposits a check then we recommend that the Proposed Regulations be clarified in this regard. On the other hand, if the expedited recredit procedures are not available to a consumer who deposits a check, then we request that the Board amend the Proposed Regulations to clearly exclude such consumers from the expedited recredit process and from the group of consumers to whom notice of recredit procedures must be sent. It would be misleading to send a notice advising such a consumer of his or her expedited recredit rights if such consumer does not have these rights.

2. Interpretation of "Mail or Deliver" and "Make Available"

Section 7 of the Act provides that a consumer must make a claim for expedited recredit within 40 days of the later of "the date the financial institution mails or delivers by a means agreed to by the consumer, the periodic statement of account which contains information concerning the transaction giving rise to the claim; or the date on which the substitute check is made available to the consumer" (emphasis added). This provision treats statements and substitute checks differently with respect to "mailing or delivery" versus "made available." In practice, this distinction can be very significant.

The Proposed Regulations and the commentary and introductory comments to the Proposed Regulations indicate that the phrase "made available to the consumer" should be interpreted to mean "mail or deliver" the substitute check or statement to the consumer. We have several concerns about this interpretation and believe that in actuality the standard for statements and for substitute checks should be expansively interpreted to refer in both instances to when such items are "made available."

"Mail or Deliver" Statement Should be Interpreted as "Make Available"

It is not uncommon for a consumer to request that a bank hold his or her account statements for some period of time, for pick up by the consumer, or even to request that the bank refrain from providing statements at all. In such cases, it seems inappropriate to interpret section 7(a)(2)(A) of the Act strictly to mean that the 40-day period would not begin until physical mailing or delivery of a statement. If a bank makes a statement available to a consumer and the consumer chooses not to receive that statement, the consumer's right to make a claim for expedited recredit should not be indefinitely tolled.

"Make Available Substitute Check" Should not be Interpreted to Mean "Mail or Deliver"

Section 7(a)(2)(B) of the Act references the date on which the substitute check is made available to the consumer. The Proposed Regulations would restrict section 7(a)(2)(B) of the Act to provide that the 40-day period does not commence until "mailing or delivery" of the substitute check to the consumer. Under this interpretation, a consumer's right to bring a claim for

expedited recredit could continue indefinitely if the consumer fails to request a substitute check. This interpretation seems unwarranted under the terms of the Act and in light of the practical impact of such a rule.

We believe that it would be more appropriate to provide the consumer with the ability to make a claim for expedited recredit for 40-days after the later of the date that the bank made available a statement revealing the transaction at issue or the date that the bank makes the substitute check available. If a consumer received, or could have received, a statement revealing the transaction in question and the bank offers the consumer the ability to obtain a copy of the substitute check at any time, the 40-day period would expire 40 days after the mailing or delivery of the statement or the date that the bank made such statement available to the consumer.

In short, we recommend that the Proposed Regulations broadly interpret sections 7(a)(2)(A) and (B) of the Act. To this end, we recommend that section 229.54(b)(1) of the Proposed Regulations read as follows:

“The consumer must submit his or her claim to the bank by the end of the 40th calendar day after the later of the calendar day on which the bank made available to the consumer –
(A) The periodic account statement that contains information concerning the transaction giving rise to the claim; or
(B) The substitute check giving rise to the claim.”

In addition, we respectfully request that the commentary discussing section 229.54(b)(1) interpret the phrase “day on which the bank made available” a statement or substitute check as meaning the earlier of the day that the bank mails or delivers such statement or substitute check or the first day on which a bank would provide such statement or substitute check if the consumer requested it.

We believe that interpreting the 40-day claim period as commencing only after physical mailing or delivery of statements and substitute checks improperly and indefinitely tolls the 40-day claim period.

B. Consumer Awareness (229.57):

1. Providing Required Substitute Check Notice as Part of Other Documents.

We note that the commentary to section 229.57(a) of the Proposed Regulations indicates that a bank may include in its disclosure “additional information regarding substitute checks that is not required by this section” (emphasis added). This could be interpreted to mean that the only information that may be included in the document containing the section 229.57(a) disclosure is information relating to substitute checks. We do not believe that the information in the disclosure document should be so limited. Accordingly, we ask that you clarify in the commentary to section 229.57(a) that the disclosure required by subsection (a) may be provided either separately or as part of a document containing other information (e.g., an agreement governing the account or disclosure regarding the specific features and terms of an account) as

long ~~as~~ the substitute check disclosure is highlighted in some way (e.g., by a use of a distinct heading).

2. Providing Required Substitute Check Notice to All Consumers.

The consumer awareness provision of the Proposed Regulations requires that banks provide to consumers the disclosure outlined in subsection (a) in certain circumstances ~~as set forth in~~ subsections (b)(1) and (2). We interpret ~~this~~ provision to mean that if a bank elects to provide a notice in compliance with subsection (a) to all of its consumer customers, whether ~~or~~ not it would be required to so notify all such customers pursuant to subsection (b)(1), the bank would not be required to provide ~~an~~ additional notice pursuant to subsection (b)(2) if a customer subsequently requests an original check or copy of a check and receives a substitute check or receives a returned substitute check. We respectfully request that the Board confirm this interpretation, perhaps by inclusion of ~~an~~ example in the commentary.

II. Responses to Certain Specific Questions Posed by the Board:

A. Process for Responding to Claims (229.54(c))

Section 229.54 (b)(3) of the Proposed Regulation clarifies that a bank that requires a consumer to submit an expedited recredit claim in writing must compute the time period for acting on the claim from the date that the consumer submitted ~~the~~ written claim, even if the consumer previously provided some information relating to the claim in another form. We support this change.

In addition, section 229.54(c) specifies that “banking day” (instead of “business day” ~~as used in the Act~~) are to be used to measure the time period for ~~a bank's~~ action. We agree that the ~~use~~ of “banking day” to measure the time period for a bank’s action is preferable.

Section 229.54(c) of the Proposed Regulations reorganizes the *statutory* provisions regarding a bank’s action on a consumer’s expedited recredit claim. The Board requests comment on whether this proposed reorganization of the statutory provisions regarding action on claims is an improvement. We believe that the organization of these provisions in the Proposed Regulations is effective.

In section 229.54(c)(4) the Board also proposes to permit a bank that has provided a recredit and subsequently determines that ~~the~~ consumer’s claim is not valid to reverse both the amount it previously recredited plus any interest that it has paid on that amount despite the fact that the ~~Act~~ is silent with respect to the ability of a bank to reverse interest. We agree with ~~that~~ in such situations the bank should be entitled to reverse interest paid on the recredited amount.

B. Consumer Awareness (229.57(b))

In section 229.57(b)(2) ~~of~~ the Proposed Regulations the Board proposes two alternative rules regarding when a bank must provide the disclosure to a consumer who requests a copy of a check. Alternative I tracks the language of the Act and specifies ~~that~~ when a ~~bank~~ provides a substitute check to a consumer in response to the consumer’s request for a check, the bank must

provide the consumer disclosure at the time of the request. Alternative 2 requires a bank to provide the disclosure at the time the bank provides the substitute check to the consumer. The Board requests comment on which of these alternatives is preferable.

As between the two Alternatives, we prefer Alternative 2. However, we respectfully request that the Board amend this provision to make it flexible so that a bank may provide the required disclosure at any time between the request and delivery of the substitute check. In the alternative, we would suggest that the regulations permit the bank to provide the notice at either time. We believe that this flexibility would allow banks to create efficient procedures without negatively affecting the effectiveness of the disclosure provided to the consumer.

C. Model C-5A

The proposed amendments to appendix C include a model consumer disclosure form labeled as model C-5A. The Board requests comment on whether the proposed model disclosure is clear, accurate, and concise.

We believe that most of the proposed model disclosure is clear and accurate; however, we offer the following suggestions.

The opening sentence of Model C5-A states that some of the checks that a consumer receives "may look different than the check you wrote." This suggests that the intended audience for the notice is only consumers who have written checks – as opposed to consumers who have deposited a check and had that item returned unpaid in the form of a substitute check. As noted previously, we believe that the application of the expedited recredit rules to depositors should be clarified. If the expedited recredit process is available to depositors meeting the requirements of Section 229.54(a), then we would suggest that Model C5-A should be modified to refer not only to checks written but also to checks deposited. On the other hand, if the expedited recredit process is available **only** to a consumer who receives a check he or she wrote in the form of a substitute check, then the Proposed Regulations should be amended to clearly exclude depositors from the expedited recredit process and from the group of consumers to whom notice of recredit procedures are sent. It would be misleading to send a notice to a depositor advising such consumer of his or her expedited recredit rights if such depositor does not have these rights.

We note that in certain places Model C5-A utilizes the terminology of the Act rather than the interpretation of such terminology provided by the Proposed Regulations. For example, the model refers to the need for a "better copy" of a check while the Proposed Regulations use the term "sufficient copy."

In addition, under the heading "How to Make a Claim for Expedited Refund" the notice provides that the 40 day period for making a claim begins on the later of the date that a bank "delivered the account statement" or "made the substitute check available." This language seems to track the Act but does not pick up the interpretation of the Act proposed in the Proposed Regulations. For the reasons that we discussed above, we believe that the better interpretation of the Act

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would be that the 40-day period would begin on the later of the date that a bank makes available the statement or the substitute check. Therefore, we suggest that Model C5-A be amended accordingly.

We suggest that the last sentence of the first paragraph under the heading "Our Responsibilities for Handling Your Claim" be modified to clarify that the bank will refund the remaining amount if it still has not made a decision with respect to the consumer's claim. If the bank has decided that the claim is not proper, it will not refund the remaining amount by the 45th day.

D. Models C-22 through C-25

The Proposed Regulations also include model notices that a bank could use to satisfy its obligation to respond to a consumer's expedited recredit claim although no statutory safe harbor applies to these models. Because use of these models offers no safe harbor, the Board specifically requests comment on whether providing model languages for the notices is useful.

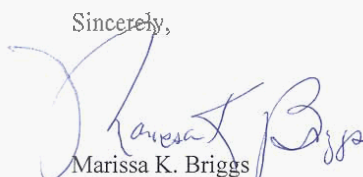
We believe that these models will be widely used by banks and are useful even in the absence of a statutory safe harbor. We respectfully request that the Board include a statement advising that the Board believes that a bank's use of the models would constitute compliance with the Act.

III. Other Amendments to Regulation C C

We support the proposal to incorporate into Regulation CC the UCC revisions that would require a person who transfers a remotely created consumer demand draft to warrant that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn. The effect of this would be to shift the ultimate liability for payment of such an unauthorized item from the paying bank to the bank of first deposit. Since, in an environment of automated check processing, the bank of first deposit is much better positioned than the paying bank to effectively control this type of fraud, we support this proposal. However, we respectfully request that you broaden the proposed warranty so that it applies, not only to remotely created consumer demand drafts, but, rather to **all** remotely created demand drafts. We are aware of no reason to have one rule for checks drawn on consumer accounts and another rule for checks drawn on commercial accounts.

Once again, we thank you for the opportunity to comment on the Proposed Regulations. Should you have any questions regarding our comments, please do not hesitate to contact Marissa Briggs (716-842-2366) or David Burstein (212-350-2580).

Sincerely,



Marissa K. Briggs
Vice President and Assistant Counsel